Supreme Court, U.S.
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In The

Supreme Court of the United States

UMS GENERALI MARINE S.p.A.,
formerly known as Unione Mediterranea di Sicurta,

Petitioner,

versus

STEVEN HENRY ARTHUR ADAMS,
for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.; and A.K. STEEL, INC.,
formerly known as Armco Steel Company, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Fed. R. Civ. P. 4(k)(2) nationwide jurisdictional analysis is appropriate in a marine insurance dispute between two foreign insurers which does not involve a federal law claim but, rather, involves claims governed by state or foreign law.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Pursuant to Supreme Court Rule 29.6, petitioner, UMS Generali Marine S.p.A. (formerly known as Unione Mediterranea di Sicurta and hereinafter "UMS"), states it has no parent company or subsidiaries. However, Assicurazioni Generali S.p.A., an Italian insurance company, holds a substantial shareholding interest in UMS.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 234 F. Supp. 2d 614 (E.D.La. 2002) and is reprinted in Appendix B. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 364 F.3d 646 (5th Cir. 2004) and is reprinted in Appendix A. The Order of the United States Court of Appeals for the Fifth Circuit denying UMS' Petition for Panel Rehearing is reported at 2004 U.S. App. LEXIS 11717 and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its Order on June 8, 2004, denying UMS' Petition for Panel Rehearing. This petition for certiorari is timely in that UMS has filed it within 90 days of June 8, 2004. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1333.

STATUTORY PROVISION INVOLVED

This case involves the interpretation and application of Fed. R. Civ. P. 4(k)(2) which provides as follows:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed. R. Civ. P. 4(k)(2) and the Advisory Committee Notes for that provision are reprinted in Appendix D.

STATEMENT OF THE CASE

I. Overview of the Case

This case presents questions concerning the prerequisites to a federal court's exercise of *in personam* jurisdiction over a foreign defendant. The Fifth Circuit, unable to find sufficient contacts to affirm the District Court's exercise of personal jurisdiction over UMS under Louisiana's long-arm statute, resorted to a Rule 4(k)(2) nationwide jurisdictional analysis in order to subject UMS to *in personam* jurisdiction. However, this marine insurance dispute does not involve a federal law claim but, rather, involves claims governed by state or foreign law.

The Fifth Circuit's holding ignores the threshold requirement of Rule 4(k)(2), namely, that a federal law claim be involved before the statute can have application. It also runs afoul of the instructional comments found in the Advisory Committee Notes which state in pertinent part that Rule 4(k)(2) "does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country."

II. Background of the Case

This case arises out of the sinking of two barges loaded with steel slabs in the lower Mississippi River on October 16, 1993. Initially, two separate and distinct disputes were involved: 1) claims litigated between Respondents (and not UMS) involving issues of negligent

conversion and/or salvage of the steel slabs that sank in the Mississippi River; and 2) an insurance dispute between Respondents and UMS involving coverage under policies of marine cargo insurance issued on the steel slabs. Only the insurance dispute remains and the petition for certiorari concerns the erroneous application of Rule 4(k)(2) to non-federal law claims that are governed by state or foreign law.

III. Proceedings Below

Early on in this now decade-old case, the District Court denied UMS' motions to dismiss for lack of personal jurisdiction and on *forum non conveniens* grounds, ruling that UMS had waived its personal jurisdiction defenses by appointing surveyors and attorneys in Louisiana to investigate a marine cargo loss.

The Fifth Circuit reversed this holding in *Adams v. Unione Mediterranea di Sicurta*, 220 F.3d 659, 670 (5th Cir. 2000), and remanded the case to the District Court for a determination of whether it had personal jurisdiction over UMS. On remand, the District Court held it had specific and general jurisdiction over UMS in Louisiana. *Adams v. Unione Mediterranea di Sicurta*, 234 F. Supp. 2d 614 (E.D.La. 2002).

On appeal in *Adams II*, the Fifth Circuit was unable to affirm the District Court's holding that it had specific and general jurisdiction over UMS in Louisiana but, instead, found an "alternate basis" of jurisdiction under

Rule 4(k)(2). *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 652 (5th Cir. 2004).[1]

UMS timely filed a petition for panel rehearing on the basis that a Rule 4(k)(2) jurisdictional analysis was inappropriate in this marine insurance dispute which does not involve a federal law claim. However, the Fifth Circuit denied UMS' petition without reasons. That holding is in direct conflict with Rule 4(k)(2).

REASONS FOR GRANTING THE PETITION

The reasons for granting UMS' petition for certiorari are compelling and fit the parameters of Supreme Court Rule 10. First, the Fifth Circuit has decided an important question of federal law erroneously and in direct conflict with the threshold requirement set out in the statute itself and the accompanying Advisory Committee Notes. Second, the opinion below, if left standing, will encourage other courts to improperly expand the narrow scope and application of Rule 4(k)(2) far beyond that envisioned by the drafters of the statute. Finally, the Fifth Circuit's opinion ignores the reasoning and policy behind the enactment of Rule 4(k)(2).

[1] UMS is a marine insurance company, specializing in cargo and hull & machinery risks, with no branches, agencies or offices outside of Italy. UMS has no jurisdictional contacts with the State of Louisiana. Thus, the Fifth Circuit focused on UMS' nationwide jurisdictional contacts, specifically, cargo shipments to the United States that were insured by UMS (even though UMS' insureds controlled the destination of those shipments), and insurance claims UMS has responded to from time to time in the United States.

The Court's review is warranted for all of these reasons.

I. The Origin of Rule 4(k)(2)

Rule 4(k)(2) was created in response to this Court's opinion in *Omni Capital Int'l v. Rudolph Wolff & Co.*, 484 U.S. 97 (1987), where Louisiana residents brought suit against Omni Capital, a New York corporation, for violation of the Federal Commodity Exchange Act (CEA). The defendants wanted to join two other parties from London in the Louisiana court action; however, the additional parties lacked sufficient contacts with the state of Louisiana, even though they did have contacts with the United States. This Court recognized that although the exclusion of the London co-defendants created an unfair result, it was up to the legislature to change the policy:

> A narrowly tailored service of process provision, authorizing service on an alien **in a federal-question case** when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other **federal statutes**. It is not for the federal courts, however, to create such a rule as a matter of common law.

484 U.S. at 111 (emphasis supplied). Congress accepted this Court's invitation by creating Rule 4(k)(2).

Rule 4(k)(2) is designed to deal with the problems identified by this Court in *Omni*. However, the statute is very narrow in scope and applies only where the following three criteria are met:

1) a federal law claim is asserted;

2) The defendant has significant jurisdictional contacts with the nation as a whole; and

3) the defendant is not subject to personal jurisdiction in any particular state.

In other words, Rule 4(k)(2) was enacted in order to close a loophole in the enforcement of federal law claims where the federal statute involved does not permit extra-territorial service.

II. Marine Insurance Claims are Not Federal Law Claims

Marine insurance causes of action are not federal law claims as stated by this Court some 50 years ago in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955):

> Under the present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been – with the States.

348 U.S. at 320-321. In *Wilburn Boat*, this Court held that in the absence of a judicially established federal admiralty rule controlling a particular marine insurance issue, the

courts should apply the applicable state law rule.[2] As noted by a leading admiralty commentator:

> . . . the application of the *Wilburn Boat* doctrine means that marine insurance in the United States will be dominated by state law rules; most federal courts simply recite the rule and apply state law.
>
> * * *
>
> The Supreme Court in *Wilburn Boat* was faced with either calling upon the federal courts to fashion a body of marine insurance law out of whole cloth or applying state law unless there was already a well-entrenched federal rule. It chose the latter, and after [fifty] years experience the system has worked reasonably well so that federalization is neither necessary nor desirable.

Schoenbaum, Thomas J., *Admiralty and Maritime Law*, Vol. 2, § 19-6, p. 275 (West 2004).

While UMS concedes that the Court has admiralty jurisdiction over this case since the underlying dispute involves interpretation of a maritime contract, controlling precedent from this Court mandates that "the regulation of marine insurance [remains] where it has been – with the States." *Wilburn Boat* at p. 321. Thus, marine insurance disputes such as this one are not governed by and do not arise under federal law, but, rather, are governed by and arise under state law (or foreign law if so mandated

[2] Neither the District Court nor Respondents have alleged in either *Adams I* or *Adams II* that there is such a judicially established federal admiralty rule which governs this marine insurance dispute between two foreign insurers.

by a choice of law clause in the insurance policy or applicable conflict of laws principles).

III. Review is Warranted Because the Fifth Circuit's Opinion is in Direct Conflict with the Threshold Requirement of Rule 4(k)(2)

Rule 4(k)(2) provides as follows:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, **with respect to claims arising under federal law**, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(Emphasis supplied.)

In light of the unambiguous wording of Rule 4(k)(2), a federal law claim must be involved before a defendant such as UMS can be haled into court utilizing a nationwide personal jurisdictional analysis. In the instant case, Respondents assert that the insurance claims against UMS are premised on and "arise under" Louisiana state law.[3] UMS contends that the underlying dispute is governed by Italian law since its insurance policy contains a mandatory Italian choice of law and forum selection clause. No party contends that a federal law claim is involved or that federal question jurisdiction under 28 U.S.C. § 1331 is implicated in this marine insurance dispute.

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[3] Respondents' complaint against UMS seeks a declaration "to the effect that Louisiana law applies to this coverage issue."

Notwithstanding the above, the Fifth Circuit justified and explained its application of Rule 4(k)(2) to this marine insurance dispute in a brief footnote in *Adams II*:

> Rule 4(k)(2) can be applied in admiralty actions such as this case because admiralty cases arise under federal law. *World Tanker*, 99 F.3d at 723.

364 F.3d at 651, n.3.

The Fifth Circuit's conclusion that Rule 4(k)(2) is applicable to this marine insurance dispute is simply wrong in view of the continued vitality of *Wilburn Boat*.

Moreover, a close reading of the Fifth Circuit's earlier decision in *World Tanker Carriers Corp. v. M/V YA MAW-LAYA*, 99 F.3d 717 (5th Cir. 1996), as well as the Advisory Committee Notes following Rule 4(k)(2), shows that the Court of Appeals erred in subjecting UMS to a Rule 4(k)(2) jurisdictional analysis.

In *World Tanker*, plaintiff's causes of action against the defendant were based on general maritime law and, thus, perhaps did "arise under federal law." In fact, what *World Tanker* holds is that Rule 4(k)(2) permits the exercise of personal jurisdiction over a foreign defendant for claims "arising under federal law" which can include causes of action based on admiralty or general maritime (*i.e.*, federal) law. However, Respondents' causes of action against UMS in the case at bar are premised on and "arise under" Louisiana or, alternatively, foreign law. Thus, a critical prerequisite for the application of Rule 4(k)(2), namely, that the "claims arise under federal law" is absent.

While there is language in two of the Fifth Circuit Court's decisions issued after *World Tanker* intimating

that admiralty jurisdiction alone is sufficient to invoke Rule 4(k)(2), see *Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001) ("claims falling within the admiralty jurisdiction of the federal courts are claims arising under federal law for the purpose of Rule 4(k)(2)"), and *Delgado v. Reef Resort Limited*, 364 F.3d 642, 645 (2004) ("Rule 4(k)(2) applies to cases sounding in admiralty since admiralty suits arise under federal law"), both the Fifth Circuit's decision in *World Tanker* and the Advisory Committee's Notes following Rule 4(k)(2) make it clear that the phrase "claims arising under federal law" refers to the substantive federal law which is a prerequisite for the application of Rule 4(k)(2):

> The Advisory Committee concludes its discussion by distinguishing federal law as substantive law distinct from state law, stating that **"[t]his narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country . . ."**

World Tanker at p. 721, quoting Advisory Committee Notes (emphasis supplied).

IV. Review is Warranted to Clarify and Reaffirm the Narrow Scope and Application of Rule 4(k)(2)

Pretermitting the question of whether application of Rule 4(k)(2) should be confined to cases involving federal

question claims or read more expansively to include general maritime law claims,[4] the recent opinions by the Fifth Circuit (and courts of other Circuits)[5] expanding application of Rule 4(k)(2) to all admiralty cases are erroneous.

For example, marine insurance disputes such as this one are not governed by and do not arise under federal law, but, rather, are governed by and arise under state law (or foreign law if so mandated by a choice of law clause in the insurance policy or applicable conflict of laws principles). Likewise, collisions on the high seas (or those occurring in coastal waters of other countries) between foreign flag vessels may well be governed by foreign (and not federal) law. Moreover, this Court has held that foreign choice of law and forum selection clauses in contracts for the carriage of goods by sea will be respected. See *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995) (upholding Japanese choice of law and forum selection clause in ocean bill of lading).

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[4] At least two legal commentators have suggested that the scope of Rule 4(k)(2) is narrow and should only be applied where a federal question claim is involved. See Callen, Jason W., *Asserting in Personam Jurisdiction Over Foreign Cybersquatters*, 69 U.Ch.L.Rev. 1837, 1849 (2002) ("Courts now use Rule 4(k)(2) to enforce claims arising under federal statutes that do not contain nationwide service of process provisions"); and Kravitz, Mark B., *National Contacts and the Internet: The Application of FRCP 4(k)(2) to Cyberspace*, U.Balt. Intell.Prop.L.J. 55, 56 (1998) ("FRCP 4(k)(2) is designed to deal with the problem in Omni, but it is very narrow in scope and applies only if the following three criteria are met: (1) the plaintiff's claim against the defendant is based on a federal question, . . . ").

[5] See *United Trading Company S.A. v. M/V SAKURA REEFER*, 1996 U.S. Dist. LEXIS 9190 *14 (S.D.N.Y. 1996) ("admiralty cases arise under federal law for the purposes of Rule 4(k)(2)").

UMS submits that blanket holdings by the Fifth Circuit to the effect that "claims falling within the admiralty jurisdiction of the federal courts are claims arising under federal law for the purpose of Rule 4(k)(2)," *Submersible Systems* at p. 420, and "Rule 4(k)(2) applies to cases sounding in admiralty since admiralty suits arise under federal law," *Delgado* at p. 645, are overbroad and incorrect. Some admiralty claims such as those involving the Suits in Admiralty Act, 46 U.S.C. app. § 741 *et seq.* (2000), and the Death on the High Seas Act, 46 U.S.C. app. § 761 *et seq.* (2004), are governed by federal law and, thus, fall within the purview of Rule 4(k)(2). However, other admiralty claims such as the marine insurance claims asserted by Respondents against UMS in this case are governed by state or foreign law and clearly do not fall within the scope of the statute.

Thus, review by this Court is warranted to clarify and reaffirm the narrow scope and application of Rule 4(k)(2). UMS also asks the Court to use this case to provide uniform guidance to the lower courts on the important and recurring question of whether all admiralty claims are subject to a Rule 4(k)(2) jurisdictional analysis.

CONCLUSION

The petition for a writ of certiorari should be granted. The Fifth Circuit's opinion ignores the threshold requirement imposed by Rule 4(k)(2), namely, that a federal law claim be involved before the statute can have application. Moreover, the opinion runs afoul of the drafters' clearly stated intent to exclude claims governed by state or foreign law from the statute's ambit (as confirmed in the

Advisory Committee Notes). The Court should reverse the Fifth Circuit for these reasons. UMS further requests that the Court grant this Petition and provide uniform guidance to the lower courts regarding the narrow scope and application of Rule 4(k)(2).

Respectfully submitted,

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September 2004

No. _____

In The
Supreme Court of the United States

UMS GENERALI MARINE S.p.A.,
formerly known as Unione Mediterranea di Sicurta,

Petitioner,

VERSUS

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY. LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.; and A.K. STEEL, INC., formerly known as Armco Steel Company, L.P.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-30026

STEVEN HENRY ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LTD; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; MARITIME INSURANCE COMPANY LTD; THE NORTHERN ASSURANCE COMPANY, LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE GROUP PLC; DAI-TOKYO INSURANCE CO UK LTD

Plaintiffs-Appellees-Cross Appellants

VERSUS

UNIONE MEDITERRANEA DI SICURTA; ET AL

Defendants

AK STEEL CORP,
formerly known as, Armco Steel Company LP

Defendant-Appellant

and

UMS GENERALI MARINE SPA,
formerly known as Unione Mediterranea Di Sicurta

Defendant-Appellant-Appellee-Cross Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed April 14, 2004)

Before DAVIS, WIENER and STEWART Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

This suit arises from the sinking of two barges in the Mississippi River and the loss of 158 slabs of steel aboard those barges. The primary issues in this appeal relate to arguments between two co-insurers of the lost steel cargo over the amount of the loss each should bear. Defendant insurer Unione Mediterranea di Sicurta ("UMS") also challenges personal jurisdiction and venue. Issues are also presented challenging the propriety of the district court's order permitting the insurers to recover in their subrogation action against A.K. Steel Corp. ("AK Steel") for converting the salvaged steel. We AFFIRM in part, VACATE in part, and REMAND this case to the district court.

I.

The facts of this case have been set out in detail in the opinion from the earlier appeal to this court, *Adams v. Unione Mediterranea Di Sicurta,* 220 F.3d 659, 664-67 (5th Cir. 2000) ("*Adams I*"). The background facts will be summarized here to the extent necessary to understand the issues in the present appeal.

On October 16, 1993, while en route from New Orleans to Cincinnati, two Canal Barge Company barges carrying 158 slabs of steel cargo broke away from their

flotilla and sank in the Mississippi river. The loss occurred during the final leg of a carriage of 1,290 steel slabs that began in Italy. The owner of the steel slabs was Duferco SA ("Duferco"), a Swiss company, which had agreed to ship the steel to AK Steel, an Ohio Company. Plaintiff underwriters Steven Henry Adams et al. ("Adams") and UMS, an Italian insurer, concurrently insured the steel cargo under separate marine cargo policies. Adams insured the steel through a cargo policy originally issued to Canal Barge Co. Ltd., with Duferco named as an additional insured. Duferco was separately insured under an open cargo policy issued by UMS. The Adams policy carried a policy limit of $5 million; the UMS policy carried a limit of $20 million per shipment. The value of the cargo was $7,580,000. Duferco and Adams ultimately agreed that the value of the lost steel was $986,352.41.

Once the two barges sank, Duferco filed a claim with UMS for the loss. After attempts by UMS and Duferco to salvage the sunken cargo failed, UMS denied Duferco's claim. Duferco then pursued its claim against Adams and abandoned the sunken cargo to the London underwriter. Meanwhile a professional salvage company, American Eagle Marine, Inc. ("American Eagle") attempted to salvage the lost cargo believing it to have been abandoned in its entirety. American Eagle successfully salvaged 127 of the sunken steel slabs and sold them to AK Steel for a net profit of $190,975.68.

Plaintiff Adams initially brought this action in June 1994 seeking a declaratory judgment: (1) identifying whom it should pay for the loss of the cargo under their cargo policy with Canal Barge; (2) that UMS was obligated under its open cargo policy with Duferco to contribute to payment for the loss; and (3) that Plaintiffs were obligated

to pay only their proportionate share of the loss. Plaintiffs named as defendants, among others, Canal Barge, UMS, and Duferco.[1]

The district court held that Plaintiffs could not recover in a contribution action against UMS for any potential share of the losses without first fully compensating Duferco for the loss. Plaintiffs then paid Duferco $986,352.41 for the loss and obtained an assignment of whatever rights Duferco had against UMS and other potential tortfeasors.

Plaintiffs later discovered a successful salvage of 127 of the sunken steel slabs by American Eagle and AK Steel. Adams demanded that American Eagle and AK Steel return the cargo or pay its value. When the two companies refused to do either Plaintiffs amended their petition to assert a claim against AK Steel and American Eagle for the value of the converted steel. UMS then cross-claimed against AK Steel and American Eagle for its share of the value of the steel.[2]

UMS filed pretrial motions to dismiss for lack of personal jurisdiction and improper forum. The district court rejected UMS's motions. The district court granted

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[1] "Plaintiffs named as defendants Ilva, the manufacturer of the steel; Duferco; Canal Barge; UMS; and Duferco Steel, Inc., an American sister company to Duferco. The court voluntarily dismissed Ilva, Duferco, Duferco Steel, Inc., Canal Barge and A.K. Steel from this initial action at various times. The Plaintiffs later made A.K. Steel a co-defendant in the action for conversion of the steel." *Adams I,* 220 F.3d at 665. Only the Plaintiffs (Adams, *et al.*), UMS, and AK Steel remain as parties in this suit.

[2] American Eagle filed a bankruptcy petition during the pendency of this case and has not participated in this appeal.

Adams motion for partial summary judgment regarding the apportionment of Duferco's loss between the two insurers, Adams and UMS. The court then proceeded with a bench trial. At the conclusion of the trial the district court denied UMS's coverage defenses and found that UMS was required to contribute *pro rata* with Adams for the loss according to their respective policy limits. The court then awarded Adams 80% of the approximately $900,000 it had paid out to Duferco. The district court further found that American Eagle and AK Steel had converted the steel and therefore awarded Adams 20% and UMS 80% of the $190,975.68 in value that AK Steel and American Eagle realized from the salvaged steel after paying the cost of salvage.

UMS appealed the district court judgment objecting to the rulings on personal jurisdiction and venue as well as the apportionment of liability between insurers. Adams cross appealed arguing that UMS was not entitled to an award from AK Steel without having paid its portion of the Duferco loss and that UMS owed Adams a portion of the attorney's fees it paid to bring the case against AK Steel and American Eagle. AK Steel appealed the district court's judgment against it. This Court addressed primarily the jurisdictional issues and remanded for further proceedings only on those issues. On remand the district court found sufficient contacts with Louisiana to justify the exercise of jurisdiction and again entered a judgment. UMS appealed.

In the current appeal UMS challenges the district court's rulings on jurisdiction, venue, and apportionment of the liability for Duferco's loss. Adams again challenges the district court's order granting UMS a *pro rata* portion of the award against AK Steel, and the refusal to award attorney's fees. AK Steel challenges the district court's

award of damages to UMS, arguing that UMS is unable to sue its additional insured, AK Steel. We address these separate challenges in turn.

II.

UMS challenges first the district court's finding that it has sufficient contacts with Louisiana to support specific and general personal jurisdiction. UMS argues that neither the coverage of this specific shipment of steel nor the coverage of prior shipments through Louisiana provide the necessary minimum contacts to support personal jurisdiction.

The Court reviews *de novo* the district court's determination that its exercise of personal jurisdiction over a non-resident defendant is proper. *Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374, 378 (5th Cir. 2002). When, as in the instant case, "the district court decides the motion to dismiss without holding an evidentiary hearing, [the plaintiff] must make only a *prima facie* showing of the facts on which jurisdiction is predicated." *Id.* In determining whether that *prima facie* case exists, we "must accept as true [the plaintiff's] 'uncontroverted allegations and resolve in [his] favor all conflicts between the [jurisdictional] facts contained in the parties' affidavits and other documentation.'" *Id.* (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 854 (5th Cir. 2000)); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 1351 (2d ed. 1990).

The district court found both specific and general personal jurisdiction in this case. *See Adams v. Unione Mediterranea Di Sicurta,* 234 F. Supp. 2d, 614, 621-25 (E.D. La. 2002). The district court also suggested that

jurisdiction might be available under Fed. R. Civ. P. 4(k)(2). *Id.* at 625-26.

Rule 4(k)(2) provides for service of process and personal jurisdiction in any district court for cases arising under federal law where the defendant has contacts with the United States as a whole sufficient to satisfy due process concerns and the defendant is not subject to jurisdiction in any particular state:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed. R. Civ. P. 4(k)(2). The Rule was enacted to fill an important gap in the jurisdiction of federal courts in cases arising under federal law:

> Thus, there was gap in the courts' jurisdiction: while a defendant may have sufficient contacts with the United States as a whole to satisfy due process concerns, if she had insufficient contacts with any single state, she would not be amenable to service by a federal court sitting in that state. . . . Rule 4(k)(2) was adopted in response to *this* problem of a gap in the courts' jurisdiction. . . .

World Tanker Carriers Corp. v. MV Ya Mawlaya, 99 F.3d 717, 721-22 (5th Cir. 1996).[3]

Before examining UMS contacts with the United States as a whole, we first consider the requirement of the last sentence of Rule 4(k)(2) that it only applies if the defendant is not subject to jurisdiction in any state. We agree with the Seventh Circuit, that a piecemeal analysis of the existence *vel non* of jurisdiction in all fifty states is not necessary. Rather, so long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction. *See, e.g., ISI Int'l, Inc. v. Borden Ladner Gervais LLP,* 256 F.3d 548, 552 (7th Cir. 2001) ("If . . . the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2)."). In this case UMS contested the transfer of this case to New York where plaintiff believed jurisdiction existed, arguing that there was no personal jurisdiction in New York. *See* UMS Mem. in Opp. to Mot. to Transfer, May 29, 2001, at 8-10. Furthermore UMS has generally challenged the existence of minimum contacts with the United States as a whole. *See* UMS Mem. Supp. Mot. to Dismiss for Lack of Pers. Jur., June 26, 2001, at 4-6. Because UMS has not offered other venues in this country where personal jurisdiction would attach and argues that it cannot be sued in the United States, the last sentence of 4(k)(2) does not preclude application of this rule.

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[3] Rule 4(k)(2) can be applied in admiralty actions such as this case because admiralty cases arise under federal law. *World Tanker,* 99 F.3d at 723.

In applying Rule 4(k)(2) the Court must determine whether the defendant has sufficient ties to the United States as a whole to satisfy constitutional due process concerns. *See World Tanker,* 99 F.3d at 723. The record demonstrates that UMS has extensive contacts with the United States.

UMS has paid claims to numerous U.S. companies, 155 in all from 1991 to 1994. The defendant insurer has covered numerous other U.S. companies which made no claims. UMS has insured hundreds of shipments to the United States. Specifically records produced by UMS and Duferco show that UMS insured approximately 260 shipments to the United States between 1989 and 1995 for Duferco alone; 138 of these Duferco shipments to the United States made between 1991 and 1994 were valued at over $130 million.

Moreover, UMS used and paid a number of individuals in the United States as claims adjusters, surveyors, investigators and other representatives to enable it to conduct business in this country.[4]

Given the volume of activity, we have no difficulty concluding that UMS has continuous and systematic contacts with the United States as a whole. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414-16 (1984); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). It was foreseeable that suit in U.S. courts would result from these business contacts. Defendant was well aware of the shipments to the United

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[4] These facts, among others, were provided by AK Steel in its Supplemental Memorandum Regarding Personal Jurisdiction, Aug. 23, 2002, at 22-25. These facts have not been contested by UMS.

States and in fact enabled the prosecution of claims in the United States by providing claims agents and surveyors here. *See Puerto Rico v. SS Zoe Colocotroni,* 628 F.2d 652, 670 (1st Cir. 1980). Thus, subjecting UMS to suit here does not offend notions of fair play and substantial justice.

Because we conclude that our exercise of jurisdiction is clearer and more straightforward under Rule 4(k)(2) than under Louisiana law, we affirm the district court's jurisdictional ruling on this alternate basis. *See Chiu v. Plano Ind. Sch. Dist.,* 339 F.3d 273, 283 (5th Cir. 2003) ("This Court may affirm on grounds other than those relied upon by the district court.").

III.

A.

UMS argues next that the district court erred in denying their motion to dismiss for improper venue. UMS complains that the district court should have enforced the forum selection clause contained in the insurance contract between UMS and Duferco which provides as follows:

> **Competent Court**
>
> Article 16. The competent Court, at the choice of the Plaintiff party, is exclusively that of the Legal Authority of the place at which the Insurer or the Agency to which the Policy has been allocated or at which the contract has been concluded, has its management.

In denying the motion to dismiss for lack of venue the district court held that Adams's claim against UMS was a contribution action and not a subrogation action. As such Adams did not stand in Duferco's shoes and would not be

bound by the forum selection clause in the agreement to which Adams was not a party:

> If Plaintiffs' suit was based on its subrogation rights, Plaintiffs would be bound by the forum selection clause. Plaintiffs seek contribution from UMS as a co-insurer. The subrogation agreement obtained from Duferco does not transform the nature of their claims against UMS into subrogation claims; rather the subrogation agreement folds into the contribution claim.

Dist. Ct. Op., May 14, 1997, at 4.

"Under the general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). Thus, under this well recognized general rule, because Adams is not a party to the UMS-Duferco contract he is not bound by the forum selection clause in the UMS policy.

UMS argues that under American, English, or Italian law an insurer who sues a co-insurer for contribution is bound by provisions in the co-insurer's insurance policy. UMS cites cases where courts have dismissed contribution actions where the defendant co-insurer had no coverage, or where plaintiffs did not comply with notice requirements in the policy. *See Continental Ins. Co. v. Highlands Ins. Co.*, 793 F.2d 225 (9th Cir. 1986) (finding that exclusion in underlying policy was a defense to the contribution action); *New York v. Blank*, 27 F.3d 783 (2d Cir. 1994) (finding that notice provision of the underlying policy defeated

coverage and provided a defense). UMS further quotes an English marine insurance treatise to support its arguments:

> The underwriter who has paid a claim and is seeking contribution on the basis of double insurance can have no better rights against the other underwriter than those possessed by the assured.

Templeman on Marine Insurance: Its Principles and Practice, 405 (5th ed. 1981).

UMS reliance on the above authorities is misplaced. We agree that the terms of the defendant co-insurer's policy limit the rights of the plaintiff co-insurer in asserting a contribution claim. The defendant can rely on its policy terms to show it provided no coverage and to show the "other insurance" provisions governing the apportionment among co-insurers in the event of multiple coverage.

> As the right to contribution arises because both the entity seeking contribution and the entity from whom it is sought are liable for the underlying obligation, it stands to reason that any fact or circumstance which would allow the latter entity to avoid liability for the obligation would preclude contribution. This opens the door to a wide range of claims attacking the validity of the policy as a whole, or its enforceability based on compliance with any number of conditions or contractual obligations.

15 Lee R. Russ, *Couch on Insurance* § 218:17 (3d ed. 1999). Thus, in defending a contribution action against a co-insurer, a defendant can rely upon provisions in its policy to show it had no coverage for the loss sued upon or how the loss should be allocated between multiple insurers.

The forum selection clause in the UMS policy is not relevant to either of these questions. We therefore decline to extend the precedents cited by UMS to bind Adams to the forum selection clause in UMS's policy.

The district court correctly refused to enforce UMS's forum selection clause.

B

UMS further argues that venue is improper in this case because it does not comport with the venue provisions of the Brussels Convention of 1968.[5] Because UMS did not sufficiently raise this issue in the prior appeal the argument is abandoned and we will not address the merits of the issue here.

In UMS's first appeal to this court it challenged the district court's decision on venue only as it related to the forum selection clause. Although it referred to the district court's rejection of UMS's Brussels Convention argument, it articulated no argument supporting reversal of that ruling.

Issues not raised or inadequately briefed on appeal are waived. *See Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 n.5 (5th Cir. 2003) (issue not raised on appeal); *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir. 1994) (finding that issue was not adequately briefed where no authorities were cited in a one page argument). Because UMS did not make an argument

[5] These venue rules have since been codified in the European Council Regulations. Council Regulation 44/2001, 2001 O.J. (L 12).

challenging the district court's venue finding regarding the Brussels Convention this argument was waived.

IV.

UMS next challenges the district court's summary judgment apportioning payment of the loss between Adams and UMS according to their respective policy limits. The district court's order apportioned the loss in a 4:1 ratio based on the UMS policy limit of $20 million and the Adams $5 million limit. UMS argues that the loss should have been apportioned based upon the value of the insured lost cargo. Had the loss been apportioned in this manner Adams and UMS would have shared the loss equally, since the value of the insured lost cargo was the same and because it fell within each insurer's policy limit.

This Court reviews a district court's grant of summary judgment *de novo,* applying the same legal standards as the district court in determining whether summary judgment was appropriate. *United States v. Lawrence,* 276 F.3d 193, 195 (5th Cir. 2001) Questions of fact are viewed in the light most favorable to the nonmovant; questions of law, like the apportionment of liability between UMS and Adams in this case, are reviewed *de novo. Id.*

The Duferco-UMS insurance policy provided an "other insurance" clause to dictate the mode of apportionment. The policy stated:

INSURANCE WITH VARIOUS INSURERS

Article 9. When for one and the same risk, several insurances with several insurers have been

> taken out separately – even by various contracting parties – Article 1910 of the Civil Code [of Italy] will apply.

Article 1910 of the Italian Civil Code provides:

> **Insurance with more than one insurer.**
>
> * * *
>
> An insurer who has made payment has a right to recourse against the other insurers for a proportional contribution based on the indemnities owed in accordance with their respective contracts. If one of the insurers is insolvent, his share shall be divided among the others.

Adams policy contained no "other insurance" clause.

In support of its argument that the loss should be allocated according to the value of the cargo insured in each policy, UMS relies on the following phrase from art. 1910: "contribution based on the indemnities owed in accordance with their respective contracts." UMS argues that this means that apportionment is based upon the value of the insured cargo rather than the policy limits.[6] The district court disagreed.

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[6] UMS did not make this argument in its response to Adams's motion for summary judgment regarding apportionment of loss. Instead, at the summary judgment stage, UMS argued that apportionment of loss should be based upon *policy limits* and that Adams policy limit was $80 million while the UMS policy limit was only $20 million. In its trial memorandum and motion for a new trial, after the district court had determined that Adams's policy limit was only $5 million, UMS changed its argument to the one it presents in this appeal, namely that apportionment should be based upon insured value and not policy limits. While we have concerns about whether this argument

(Continued on following page)

In beginning its analysis the district court recognized the existence of the UMS "other insurance" clause and the absence of a similar clause in the Adams contract. Based upon the single "other insurance" clause the district court determined that it must give effect to that contractual provision. Dist. Ct. Op., June 3, 1998, at 10-11 (citing Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes,* § 11.03[b]). The district court then proceeded to interpret the "other insurance" clause, the relevant Italian Code article, and the policy as a whole and determined that the UMS-Duferco policy "appear[ed] to follow the majority rule of *pro rata* division based on the ratio which the individual insurer's limits bear to the sum of all available coverage." *Id.* at 11.

Contrary to UMS's arguments, the district court's decision to divide loss based upon policy limits was not based upon substantive American law. Instead the decision was based upon its interpretation of the UMS contract and Italian Code art. 1910 referred to in that contract. The phrase giving a coinsurer a "right to recourse against the other insurers for a proportional contribution based on the indemnities owed in accordance with their respective contracts" refers to the exposure each insurer has to the insured under their respective policies. The contract was the law between the parties regarding the apportionment of loss in instances of concurrent insurance. We agree with the district court's interpretation of the UMS-Duferco contract.

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was properly raised below, we nevertheless address UMS's latter argument on its merits.

V.

Adams and AK Steel bring cross appeals against UMS related to the judgment against AK Steel and the apportionment of that award. "Of course, we review bench trial findings of fact for clear error; conclusions of law, *de novo.*" *Baldwin v. Stalder,* 137 F.3d 836, 839 (5th Cir. 1998).

A.

Adams challenges the district court's order to split the tort award of $190,975.68 against AK Steel *pro rata* between Adams (20%) and UMS (80%). Adams asserts that UMS is not entitled to any portion of the award from AK Steel until UMS pays Adams for its share of the loss incurred by Duferco.

The district court reasoned that each insurer should recover against the tortfeasor, AK Steel, in the same percentage each was required to pay for the loss.

As a general rule "under the doctrine of equitable subrogation . . . where an insured is entitled to receive recovery for the loss from . . . the insurer and the tortfeasor, it is only after the insured has been *fully compensated* for all of the loss that the insurer acquires the right to subrogation[.]" 16 Lee R. Russ, *Couch on Insurance,* § 223:134, at 147-48 (3d. ed. 2000) (emphasis added); *see also* 6A John Alan Appleman & Jean Appleman, *Insurance Law and Practice,* § 4121, at 395 (1972) ("An insurer was not deemed to be subrogated to the rights of the insured unless it had *paid* the loss in full." (emphasis added)). UMS has made no payments to Duferco to compensate it for the lost steel. UMS therefore is not subrogated to Duferco's right to assert a claim against AK Steel and the

district court erred in awarding any part of the judgment to UMS.

If UMS pays its share of the insured loss, it may well be entitled to an equitable credit for its share of the tort recovery. On remand the district court should give UMS an opportunity to satisfy Adam's judgment against it, and if it does so, the district court can give UMS an equitable credit for a portion of the tort recovery.

We therefore vacate the district court's award of approximately $151,000 to UMS and award the entire $190,975.68 to Adams. On remand the district court may conduct whatever proceedings it considers necessary to consider UMS's claim to an equitable credit once UMS pays or agrees to pay its share of the insured loss.

B.

Defendant AK Steel argues that UMS would never be entitled to recover its share of the profits from the salvaged steel because AK Steel was an additional insured of UMS. According to AK Steel it is entitled to a credit for UMS's share of the approximately $191,000 and should, at most, be required to pay Adams its 20% share. We disagree.

AK Steel is correct that an insurer generally cannot subrogate against its insureds:

> This Circuit has overwhelmingly upheld the fundamental principle of insurance law which states that an insurer may not sue its own insured to recover under the insurance policy. An insurer cannot by way of subrogation recover against its

> insured or an additional assured any part of its payment for a risk covered by the policy.

Peavey Co. v. M/V ANPA, 971 F.2d 1168, 1177 (5th Cir. 1992) (citations omitted).

But not all suits by an insurer against its insureds are barred. An insurer may recover damages from an insured for losses outside the policy. In particular an insurer may bring a reimbursement action against its insured for recovered property or an insurers overpayment for losses, even where a subrogation action is forbidden. 16 Lee R. Russ, Couch on Insurance, § 226:4, at 15-16 (3d ed. 2000) ("The importance of the various theories supporting reimbursement lies in their ability to circumvent significant obstacles encountered by an insurer seeking recovery under subrogation. . . . For example, recovering funds from an insured by means of reimbursement may be allowable even when the recovery of the same funds under the theory of subrogation would be barred by the rule that an insurer may not be subrogated to claims against its own insured."); *see also id.* § 226:135, at 134 ("An insurer may recover payments it has made for lost property if the property is subsequently found, or the property is subsequently delivered, and may similarly recover stolen property that has been reacquired by the insured.")

This Court has clearly recognized an insurer's right to recover against an insured for reimbursement:

> While public policy does not allow an insurer to sue its own assured on the insurance policy, the law recognizes that there may be causes of action by an insurer outside the policy. . . . Zurich's [the insurer] suit against Degesch [the assured] is not one of subrogation but one of reimbursement.

Peavey, 971 F.2d at 1177. The district court decided and the parties have not challenged on appeal that Duferco was the owner of the lost steel and Adams paid Duferco for that steel. AK Steel sufferd no loss and was unjustly enriched at the expense of Adams by the conversion of the lost steel. UMS, once it pays its share of the loss, is therefore entitled to recover in reimbursement against AK Steel even if AK Steel is an additional insured under the UMS policy. Any recovery is outside the policy and unaffected by the general prohibition against insurers enforcing subrogation against their insured.

VI.

Finally Adams challenges the district court's denial of attorney fees.

We review awards of attorneys fees under an abuse of discretion standard. Underlying questions of fact are reviewed for clear error; questions of law, *de novo. Jason D.W. v. Houston Ind. Sch. Dist.,* 158 F.3d 205, 208 (5th Cir. 1998) (*per curiam*).

According to the general "American Rule" applied in admiralty cases, attorney fees are not awarded absent a statutory or contractual authority. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 268-69 (1975). We find no reason to deviate from the American Rule in this case.

VII.

For the reasons stated above, we affirm all features of the district court's judgment except in one respect. We vacate the district court's award of a portion of the

recovery against AK Steel to UMS and remand for the district court to award the entire recovery to Adams. The district court can also consider UMS claim to an equitable credit if it pays its share of the insured loss.

AFFIRMED in PART; VACATED in PART; REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN HENRY ARTHUR ADAMS, ET AL.	**CIVIL ACTION**
VERSUS	**NO. 94-1954**
UNIONE MEDITERRANEA DI SICURTA, ET AL.	**SECTION "K"**

ORDER AND REASONS

(Filed Nov. 27, 2002)

On August 14, 2000, the United States Court of Appeals for the Fifth Circuit, remanded this matter to this Court to determine whether the Court has personal jurisdiction over UMS Generali Marine S.p.A. (formerly known as Unione Mediterranea di Sicurta and referred to as "UMS") rejecting this Court's finding at trial on the matter that UMS had waived its personal jurisdiction defenses. On remand, a number of motions were filed, including a Motion to Dismiss filed by UMS which motion was denied because of a lack of critical factual information necessary to make a comprehensive jurisdictional finding. The Court ordered briefing to be submitted to the Court, and after extensive discovery was had, supplemental briefing on the issue of personal jurisdiction has been filed. The Court is now prepared to determine whether it has personal jurisdiction over UMS as ordered by the appellate court.

The facts that give rise to this dispute are comprehensively set forth in *Adams v. Unione Mediterranea Di Sicurta,* 220 F.3d 659, 664-65 (5th Cir. 2000) and are

adopted by the Court. For purposes of this ruling Court will focus on those necessary facts as supplemented by the briefing, exhibits, and deposition testimony which have been filed to augment the record to determine the jurisdictional issue. The gravamen of this controversy centers on certain steel cargo owned by Duferco, S.A. ("Duferco"), insured by UMS, which was shipped from Italy, on September 16, 1993, aboard the M/V TURANDOT. It arrived in Darrow, Louisiana, for unloading onto various barges, including barge numbers CBX-207 and CBX-214, for transportation to its final destination, Cincinnati, Ohio. Canal Barge Company, Inc. ("Canal Barge"), a Louisiana corporation and the barge carrier, had obtained cargo insurance on the steel slabs from plaintiffs, Steven Henry Arthur Adams, and Certain Underwriters at Lloyds ("London Underwriters"). The shipment of steel was offloaded and placed on the barges by the Louisiana-based Cooper/T. Smith, Inc. On October 12, 1993, under tow by the Tug BILL ANDREWS owned and/or operated by Canal Barge (UMS Answer, Rec. Doc. 83), the barges set course upriver. On or about October 16, 1993, Barges CBX-207 AND CBX-214 sank. The cargo aboard those two barges was lost and is the subject of this dispute. A.K. Steel Corporation, who was the original intended purchaser, purchased the salvaged cargo.

This Court has not held an evidentiary hearing on jurisdiction; rather, it simply ordered briefing which has resulted in the filing of a number of affidavits, deposition testimony, exhibits and other evidence.[1] "When a district

[1] The Fifth Circuit intimated that this Court had a "hearing" on the jurisdiction issue. *See Adams,* 220 F.3d 659, 670 n. 10. For the sake of clarity, only oral argument on UMS's Motion to Dismiss for Lack of

(Continued on following page)

court decides a motion to dismiss without holding an evidentiary hearing, plaintiff must make only a *prima facie* showing of the facts on which jurisdiction is predicated." *Nuovo Pignone, SpA v. M/V STORMAN ASIA,* ___ F.3d ___, 2002 WL 31318068 (Oct. 31, 2002) at *2. The Fifth Circuited continued, "To decide whether a *prima facie* case exists, we must accept as true [plaintiff's] 'uncontroverted allegations, and resolve in [its] favor all conflicts between the facts contained in the parties' affidavits and other documentation.'" *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 854 (5th Cir. 2000). The Court will now, based on that standard, examine the background facts that will guide it in making its determination with respect to jurisdiction.

BACKGROUND

UMS Contacts – In General

UMS is apparently the second largest cargo insurer in Italy. It has a single office located in Genoa, Italy. All of its employees and physical assets are located in that office. (London Underwriters, Exh. B, Dep. of Luigi Giovannini,

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Personal Jurisdiction (Doc. 33), Canal Barge Co., Inc.'s Motion for Summary Judgment (Doc. 37) and London Underwriters' Motion to Compel Substitution of Real Party in Interest (Doc. 38) was conducted on November 29, 1995. No testimony was received. As such, a "full evidentiary hearing" was not held then and to date has not been. Thus, the plaintiff's burden is met by the presentation of a *prima facie* case for personal jurisdiction. *DeMelo v. Toche Marine Inc.,* 711 F.2d 1260 (5th Cir. 1983); *see also Data Disc. Inc. v. Systems Technology Assoc., Inc.,* 557 F.2d 1280 (9th Cir. 1977) (if court determines it will only receive affidavits or affidavits plus discovery materials, these limitations dictate a plaintiff must make only a prima facie showing of jurisdiction).

at 9-11).[2] UMS maintains that it has, *inter alia,* (1) never stipulated an insurance contract in the United States; (2) it never has qualified to do business in the United States; (3) has never appointed an agent for service of process in the United States; (4) it does not maintain an office, post office box, address, telephone or telephone listing in the United States; (5) it does not own, or lease any real or personal property in the United States. (Doc 418, UMS Supplemental Memorandum, Ex. "B").[3] Nonetheless, UMS insures cargo shipped by sea, land or air throughout the world. (London Underwriters, Exh. A, Dep. of Gianmario Rocca at 27).

It is unclear what percentage of UMS's income from 1991 through 1994 was generated by insuring cargo that was destined for United States ports. With respect to Duferco alone, UMS provided coverage for approximately 95 shipments to Louisiana between 1989 and 1995. Between 1991 and 1994, there are certificates of insurance demonstrating 39 Duferco steel shipments through New Orleans. (A.K. Steel Exh. 12, Duferco Certificates of Insurance). The insured value of these shipments totals over $39 million.

From March 20, 1991, through July 14, 1994, UMS made 40 wire transfers to entities located in the United

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[2] All exhibit references unless otherwise noted are to exhibits filed in conjunction with the memoranda presented on remand.

[3] In the same affidavit, UMS maintains that it has no correspondents in the United States, that it never employed any agents, servants or employees in the United States. These affirmations have been contradicted by other evidence presented, and as explained earlier the Court must give credence to the opposing evidence in that regard at this time.

States who were designated as "*commissar d'avaria.*" (London Underwriters, Exh. "K"). The literal translation of these two words is "damage assessor" (Rocca at 44).[4] It appears to the Court from the deposition testimony and exhibits that these are law firms or companies that were and are hired by UMS and paid in the United States. These entities basically adjust claims; they retain surveyors, handle the salvage of the cargo, and the like.

For example, Italian Claims Agency, Inc. ("ICA") assesses damage, hires surveyors and collects the necessary paperwork that is then sent to the client. Victor Bruzzone, the secretary and vice-president of ICA, testified in his deposition that he does not consider himself to be a surveyor, an adjustor or a claims agent, but an "accumulator." (London Underwriters, Exh. "D", pp. 11-13). Another company listed as a *commissar d'avaria* was Transatlantic Marine Claims Agency. David Tan, its president testified that it has worked for UMS for the last decade. Transatlantic Marine Claims Agency is authorized to retain the services of claims adjusters, attorneys and surveyors to handle a case, including retaining experts, without contacting UMS for permission. They are authorized to execute receipt and releases on its behalf. (London Underwriters, Exh. F. pp. 3-5). In addition, UMS apparently uses three experts based in Italy in processing its claims investigations. These persons are Captain Cappato,

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[4] The UMS internet cite translates this term to "claims agents" and states that "in case of need, you will be able to identify rapidly the Average Adjuster nearest to the place of the occurrence and/or where the goods involved are held, to ask him to step in immediately in accordance with the policy." (A.K. Steel, Exh. 6). This advertisement certainly indicates an on-going relationship with U.S.-based agents for purposes of dealing with claims arising out of UMS's insurance policies.

Engineer Menini and Dr. Cambiaso. (Dep. of Rocca pp. 37-38). Captain Cappato was involved in resolving the cargo claim at issue herein.

In addition, it appears that 137 claims were paid to the United States from 1991 to 1994. (London Underwriters, Exh. M). The primary beneficiaries were Tad U.S.A., Inc. and Duferco Steel, Inc., a subsidiary of Duferco, S.A. located in Lawrence, New Jersey. There are a number of other insureds in the United States as well. These entities are Galaxy Management, Global Lanes International Corp. Abstoss International Steel, Inc. and Thyssen Steel. (London Underwriters, Exh. "N" *in globo*).

Specific Contacts With Respect to the Instant Claim

The Policy

UMS issued to Duferco, S.A. ("Duferco") an open cargo policy of insurance, Open Cover No. 1381/111 on August 8, 1993. It was for a 12 month term from June 1, 1993 to May 31, 1994. (A.K. Steel Exh. 4, Policy, Art. 18) (hereinafter "Policy"). It granted coverage to all shipments of siderurgical products for which Duferco was required to obtain insurance. (Policy, Art. 1).

As such, Duferco was required to:

> declare each risk hereto by telex or telefax; these declarations must be sent before the sailing date and should contain details of the shipment, such as name of the vessel, voyage, sailing date, kind of cargo, approximate quantity and insured

> value, together with the insurance conditions requested.

(Policy, Art. 4).

An addendum to subject open cargo policy also states:

> By the present addendum, forming part of the above mentioned policy, it is noted and agreed that, as partial amendment of what provided by Articles 11 and 12, it is agreed that: after discharge overside from the overseas vessel at ocean discharging port, the goods have to be reforwarded to the final destination by means of barge, pontoon or similar means, under a separate carriage contract, a condition of this insurance is that a Surveyor, to be agreed by Underwriters, must attend to the cargo loading on barges, to ascertain the conditions of the means of conveyance and the suitability of the stowage effect on board of the same.
>
> In case of non intervention of Surveyor at reloading, no claim shall be recoverable hereunder.

(Policy, "DI 1381/111 – App. 1"). Thus, under the very terms of this policy, UMS contemplated being involved in the actual transshipment of the cargo and requiring the approval by its agent of such stowage. It is interesting to note that this provision at one point in this litigation was invoked as a policy defense; UMS contended at one time that Duferco's failure to obtain such a surveyor vitiated coverage. It subsequently dropped this defense.

Duferco/UMS Negotiation of Quote for Subject Insurance

With respect to the subject insurance, a fax dated August 24, 1993, was sent from Mr. Michelini of Duferco in Lugano, Switzerland to Mr. Morino of UMS in which it was confirmed that the terms of the relevant contract were CIF with duty paid delivery to Cincinnati, Ohio. (London Underwriters, Exh. C, Dep. of Arturo Michelini, p. 11 and 14.). That fax to UMS states specifically:

> FOLLOWING TELCON CONFIRM YOU WE BOUGHT 150,000 MT APPROX OF SLABS FROM ILVA SOLD TO BETHLEHEM STEEL ON CONSIGNEMENT BASIS MEANING MATERIAL WILL BE SHIPPED AND WILL BE PLACED INTO A STOCKAGE AREA AND WILL REMAIN THERE UNDER THE NAME OF DUFERCO.
>
> . . .
>
> WE WILL PLACE MATERIAL INTO TWO DIFFERENT STOCKAGE AERA(SIC) DEPENDING THE WAY WE SHIP IT MEANING FOR THOSE QUANTITIES WHICH WILL GO VIA OCEAN VESSEL FROM TARANTO TO PORT OF INDIANA (CHICAGO) DIRECTLY MATERIAL WILL BE STOCKED INTO A WAREHOUSE ON PORT OF INDIANA WHILE FOR SHIPMENTS WHEREBY OCEAN VESSELS WILL GO FROM TARANTO TO NEW ORLEANS AND THEN MATERIAL WILL PROCEED TO LAKES DESTINATION VIA BARGE WILL BE STOCKED AT BETHLEHEM BURNS HARBOUR PLANT BECAUSE AS I EXPLAINED YOU BARGES WILL GO DIRECTLY TO BETHLEHEM PLANT. AS FAR AS SECURITY OF MATERIAL WE HAVE A UCC1 FILING DONE THOUGH OUR LAWYER.

> WE NEED TO PREPARE AN INSURANCE CERTIFICATE ISSUED TO THE ORDER OF BANK FINANCING BUSINESS COVERING OCEAN VOYAGE + BARGE VOYAGE (WHERE NECESSARY) AND 4/5 MONTHS IN STOCK-AGE AREA AS INDICATED ABOVE.
>
> . . .
>
> PLEASE COMMENT ADVISING SUGGESTED PREMIUM TO BE APPLIED KEEPING IN MIND WE ARE TALKING OF STEEL SLABS WHICH IS MATERIAL FOR WHICH ONLY EXCEPTION NATURAL EVENT COULD END-UP TO A CLAIM.

(London Underwriters, Exh. S). A fax dated August 26, 1993, outlining terms in Italian for such coverage was then sent to Duferco. Duferco confirmed its agreement to the conditions shown on the UMS fax of August 26, 1993 by fax on September 8, 1993. Thus, it is evident that the two parties specifically consulted with respect to insurance coverage for the subject voyage and the cost of that coverage was specifically negotiated. The argument that UMS was unaware of the circumstances of this voyage and the specific coverage for the subject steel slabs is without foundation in the evidence presented to the Court.

In addition, a Certificate of Insurance was issued that used standard language for a CIF delivery. The certificate is required for the issuing of a Letter of Credit to be used in the cargo transaction itself. Regardless of who actually issued the certificate, a copy thereof is required to be transmitted to UMS under Italian law. (Dep. of Rocca, pp. 45-48).

The Voyage

Indeed, as described in the fax to UMS, the subject cargo made its way to Darrow, Louisiana. The cargo was offloaded by a Louisiana stevedore onto barges owned and operated by a Louisiana company, proceeded upriver through Louisiana, was pushed by a towboat owned and/or operated by Canal Barge, a Louisiana company, and sank in the Mississippi River.

Where the barges actually sank and the location of the lost cargo when it was salvaged has been the subject of much debate.[5] With the record before the Court, the Court finds that for purposes of its jurisdictional analysis, the cargo sank on the Louisiana side of the Mississippi. This finding is based on the position as calculated by plaintiff's counsel using the U.S. Coast Guard Report of Marine Accident, Injury or Death of October 16, 1993, and the bearings described therein. (Doc. 335, Ex. 1, Affidavit and docs. attached). While UMS disagrees with the findings contained in the affidavit, the Court must accept this affidavit as true at this point in time. *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d at 854.

The Court will now apply these facts to the relevant legal standards.

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[5] A.K. Steel took the position that because the cargo that is the subject of this suit was located in the riverbed of the Mississippi River that was owned by the State of Mississippi, Mississippi state law applied to certain legal issues presented rather than admiralty law, the Court found that this position did not constitute a judicial admission. (Rec. Doc. 368).

PERSONAL JURISDICTION ANALYSIS

A federal court sitting in diversity may assert personal jurisdiction if (1) the state's long-arm statute applies, as interpreted by the state's courts; and (2) if due process is satisfied under the Fourteenth Amendment to the United States Constitution. *Cycles, Ltd. v. W.J. Digby, Inc.,* 889 F.2d 612, 616 (5th Cir.1989). As noted, London Underwriters bear the burden of making a *prima facie* showing of sufficient contacts to establish personal jurisdiction over the nonresident. *Bullion v. Gillespie,* 895 F.2d 213 (5th Cir.1990).

Application of Louisiana's Long Arm Statute

A federal district court sitting in diversity may exercise personal jurisdiction only to the extent permitted a state court under applicable state law. *Allred v. Moore & Peterson,* 117 F.3d 278, 281 (5th Cir.1997). The Louisiana long-arm statute extends personal jurisdiction to the maximum limits permitted by due process. *Pedelahore v. Astropark, Inc.,* 745 F.2d 346, 348 (5th Cir.), *reh. denied, en banc,* 751 F.2d 1258 (5th Cir.1984). Due process advances a two-pronged test in order for the Court to exercise jurisdiction: (1) the nonresident must have minimal contacts with the forum state and (2) subjecting the nonresident to jurisdiction must be consistent with traditional notions of fair play. *Id.* at 348; *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154 (1945).

Minimum contacts with the forum state can arise incident to either "specific jurisdiction" or "general jurisdiction." The Supreme Court gave its approval to this distinction in the seminal case, *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984). Lawrence W.

Moore, S.J., *The Relatedness Problem in Specific Jurisdiction,* 37 Idaho L. Rev. 583 (2001). "Inchoate hints of this distinction are nonetheless found in *International Shoe.*" *Id.* at n.2. "Specific jurisdiction is appropriate when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action." *Felch v. Transportes Lar-Mex Sa Da CV,* 92 F.3d 320, 324 (5th Cir.1996), *citing Wilson v. Belin,* 20 F.3d 644, 647 (5th Cir.), *cert. denied,* 513 U.S. 930 (1994). Indeed, "[a] single act, by the defendant directed at the forum state, therefore, can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted." *Ruston Gas Turbines, Inc. v. Donaldson Co.,* 9 F.3d 415, 417 (5th Cir.1993).

Specific Jurisdiction – "Related to or Arising Out Of" in the Context of an Open Cargo Policy of Insurance

UMS takes the position that because the only "intersection" between UMS and the State of Louisiana was that (1) UMS insured cargo, (2) that was unloaded in Louisiana, (3) onto barges owned by a Louisiana company for transportation to Ohio, there are insufficient contacts for jurisdiction to attach. It maintains that the fact that the cargo "briefly paused in the State of Louisiana is the type of random, fortuitous and attenuated contact which the Supreme Court has rejected as a basis for jurisdiction." For this proposition UMS relies primarily on a district court case, *Young v. Britannia Steam Ship Ins. Assoc., Ltd.,* 1994 WL 320972 (E.D. La. June 29, 1994), and *Travelers Indem. Co. v. Calvert Fire Ins. Co.,* 798 F.2d 826 (5th Cir. 1986). However, the Court is not persuaded by UMS's argument. While UMS tries to persuade the Court

that *Calvert* stands for th proposition that the mere insuring of cargo that may nter a port does not provide sufficient contacts with tha port to provide jurisdiction, *Calvert* does not provide suc a clear cut rule. Indeed, the facts inexorably demonstra e that UMS's contacts with Louisiana are directly relate to the cause of action.

In *Calvert,* a Panamar ian cargo ship, S/S EURY-BATES, collided with a Uni ed States naval destroyer in international waters off the Panama Canal. Both ships were damaged as well as t e cargo on the Panamanian vessel. Calvert Fire Insura ce Company ("Calvert") was the lead Hull Underwriter. Liability coverage respecting cargo aboard the EURYBA TES was provided under a mutual protection and ind mnity policy ("P&I policy") issued to the vessel's owner t rough The London Club. The owner of the vessel filed a li mitation of liability action in the United States District Co urt for the Eastern District of Louisiana. Ultimately, Trav lers was the surety on the bond filed to prevent the se izing of the EURYBATES in that litigation; Travelers re ied on Hull Underwriters to indemnify it. The London Cl b was never made a party to the litigation.

In the limitation proce ding, the district court held the EURYBATES solely at fault for the collision. As a result, the EURYBATES was liable to cargo, and coverage that had been provided by the Hull Underwriters with respect to the cargo damag e was then denied. As such, Hull Underwriters asserted that it was not liable for the bond covering the cargo loss paid by the Navy and refused to indemnify Travelers for th e entire amount of the bond. Travelers was not made av vare of the adverse decision against the EURYBATES, a s it had not been an actual party in the limitation. T ravelers sought to have the

judgment reformed to make all the damages collision damages; however, that motion was denied.

Ultimately, Travelers sought to make the London Club, which had provided the cargo coverage, and the Hull Underwriters, parties to a subsequent declaratory judgment action which it filed to "require Hull Underwriters to pay the entire amount of the bond, and alternatively to make the London Club pay for the cargo damages." *Calvert,* 798 at 830. The London Club asserted that the court lacked personal jurisdiction over it because the suit did not arise out of activities in Louisiana, and the London Club did not have sufficient contacts with Louisiana. The district court found it had personal jurisdiction; the Fifth Circuit reversed.

The appellate court found that Louisiana could not assert either specific or general jurisdiction over The London Club since the suit neither arose out of nor was related to any contacts of The London Club with Louisiana, and it did not have sufficient systematic contacts to justify general jurisdiction. The Fifth Circuit in so finding, however, did not reject two cases wherein jurisdiction over a cargo insurer was found; rather, it distinguished *Puerto Rico v. The SS ZOE Colocotroni,* 628 F.2d 652 (1st Cir. 1980), *cert. denied,* 450 U.S. 912 (1981) and *McKeithen v. M/T FROSTA,* 453 F. Supp. 572 (E.D. La. 1977) on the facts of the case before it.

The *Colocotroni* case and its progeny stand for the proposition that:

> [c]learly contracting to insure property located within a jurisdiction, even if the presence of that property is transitory, subjects a foreign marine-insurer to jurisdiction on suits over such

> insurance. *See Puerto Rico v. The SS ZOE COLOCOTRONI,* 628 F.2d 652, 667-70 (1st Cir. 1980), *cert. denied,* 450 U.S. 912, 101 S. Ct. 1350, 67 L.Ed.2d 336 (1981); *American & Foreign Ins. Ass'n v. Commercial Ins. Co.,* 575 F.2d 980, 982 (1st Cir. 1978); *Atlantic Lines, Ltd. v. M/V Domburgh,* 473 F. Supp. 700, 702-704 (S.D. Fla. 1979).

Armada Supply Inc. v. Wright, 858 F.2d 842, 849 (2nd Cir. 1988). As stated in the *Colocotroni* decision, an insurance company, unlike a company that sells a product into a stream of commerce, has control over its product. It can through its contracts of insurance meaningfully influence and control the course taken by insured vessels or insured cargo. By limiting coverage to specified jurisdictions, an insurance company can be reasonably certain the it would not be hailed into court in an undesired forum. "In other words, an insurer is not at the mercy of the insured owner's unilateral choice of destination in the same way a seller of chattels is at the mercy of the buyer." *Colocotroni,* 628 F.2d at 670.

In addition, "the Supreme Court has occasionally suggested that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations." *Andreyev v. Sealink, Inc.,* 143 F. Supp. 192, 198 (D. Puerto Rico 2001) *citing Colocotroni,* 628 F.2d at 670 n. 18. "In cases against insurance companies, the forum state has a high public policy interest in promoting effective redress of injuries." *Id.*

It is beyond cavil that UMS in the case at bar had knowledge that the subject cargo was to pass through and be transshipped onto barges in Louisiana. The aforementioned faxes and telexes demonstrate that explicitly. Thus,

UMS placed its product, insurance coverage, into the stream of commerce by insuring a product that it knew was destined for transshipment in Louisiana. *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.,* 9 F.3d 415, 420 (5th Cir. 1993). Indeed, UMS's own contract of insurance required a surveyor to be present at the time of transshipment. To the degree that foreseeability is implicit in the requirement that there be a substantial connection between Louisiana and UMS, certainly, it was foreseeable to UMS that it might be required to defend a claim in Louisiana. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L.Ed. 2d 490 (1980). Furthermore, clearly, the controversy at bar relates to and arises out of the coverage specifically extended to Duferco by virtue of the UMS open cargo policy of insurance. *See Amoco Oil Co. v. Phillipe Martin & Associes,* 711 F. Supp. 253, 255-56, *aff'd,* 998 F.2d 1013 (5th Cir. 1993); *Chilean Nitrate Corp. v. M/V Hans Leonhardt,* 810 F. Supp. 732, 737 (E.D. La. 1992); *Tropical Cruise Lines, S.A. v. Vest Ins. Co.,* 1992 WL 392637 (S.D. Miss. May 6, 1992). Had UMS not wanted to be subject to suit in Louisiana, it was free to exclude coverage with respect to this area. It did not.

Additionally, as "minimum contacts" required for specific jurisdiction to attach is satisfied by actions by which the non-resident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws," *Ruston.,* 9 F.3d at 419, *citing Burger King Corp. v. Rudzewicz,* 105 S. Ct. 2174, 2183, n. 11 (1985), the evidence of the volume of cargo that UMS has provided to Duferco alone – 95 shipments between 1989 and 1995, 39 steel shipments through New Orleans between 1991 and 1994 with a value of over $39 million – indicate its

voluntary membership in the economic chain that brings it revenue by virtue of its business of insuring Louisiana bound cargo. *Nuovo Pignone v. M/V Sorman Asia,* ___ F.3d ___, 2002 WL 31318068 (5th Cir. Oct. 31, 2002). Moreover, the cargo was lost in Louisiana. If the cargo involved had been oil, as in the case of *Colocotroni,* and that oil had injured the drinking water of Louisianians, the impact would be clearer. Nonetheless, in light of the evidence, this fact further supports a finding of specific jurisdiction.

All of these facts inexorably distinguish this case from the facts presented in *Calvert.* No evidence was adduced that the insured vessel in *Calvert* either entered Louisiana waters during the voyage in question, or at any other time. The accident at issue in *Calvert* did not occur in Louisiana which fact the *Calvert* court deemed "of most significance" in rejecting specific jurisdiction in that case. There was no indication that the policy at issue in *Calvert* itself required informing the insurer of a voyage as was required with respect to cargo in the instant open cargo policy cited above. There was no proof advanced in *Calvert* as to the specific knowledge of the insurer as to the course the vessel insured was to take. Unlike the case at bar, there was no indication of any specific negotiation with respect to the cost of the cargo coverage including the specifics of the route and cargo path. In addition, no evidence was offered in *Calvert* relating to the number of vessels actually insured by The London Club that regularly traveled in Louisiana waters, or that there would be a transshipment of the cargo in the forum (New Orleans). With all of that noted, as *Calvert* acknowledged the possibility of finding specific jurisdiction in its reading of the *Colocotroni* case, this Court finds that there were sufficient acts by the defendant directed at Louisiana to

confer personal jurisdiction because those acts gave rise to the instant claim being asserted. *Ruston Gas Turbines, Inc.*, 9 F.3d at 417.

The facts recited above clearly demonstrate that this controversy arises out of and relates to UMS's contacts with Louisiana. Illustratively, the cargo sank in Louisiana. The cargo was transshipped in Louisiana with UMS's specific knowledge. UMS insures a substantial amount of cargo that goes through Louisiana, and it specifically chose to insure the subject cargo that was to pass through Louisiana. As such, specific jurisdiction arises over UMS.

General Jurisdiction

As previously noted, exercise of general jurisdiction does not offend due process if there are sufficient contacts between the state and the foreign corporation. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S. Ct. 1868, 1872 (1984). Thus, general personal jurisdiction attaches, even if the nonresident defendant's contacts with the forum state are not directly related to the cause of action, if the defendant's contacts with the forum state are "continuous and systematic". *Felch v. Transportes Lar-Mex Sa Da CV,* 912 F.3d 320, 324 (5th Cir. 1996).

In light of the evidence presented with respect to UMS's economic gain generated by its over-all business of insuring cargo bound for the Louisiana, the Court finds sufficient contacts. In *Calvert,* the appellate court found insufficient contacts to establish general jurisdiction because there was no evidence of the insurer covering any Louisiana resident, of a local firm acting as a general agent for the insurer, of insuring any Louisiana-related risks, or that any insured vessels were "either based in

Louisiana or engaged in other than strictly international commerce." *Calvert* 798 F.2d at 833. As this Court noted previously, *Adams v. Unione Mediterranea Di Sicurta,* 2001 WL 986867 (E.D.La. Aug. 27, 2001) at 3, this analysis was developed by contrasting the facts before it with those demonstrated in *McKeithen v. M/T FROSTA,* 435 F. Supp. 572 (E.D.La. 1977) (Rubin, J.). Judge Rubin found in *McKeithen* that a foreign insurer who regularly insures vessels entering Louisiana waters could be subject to jurisdiction in Louisiana based solely on that activity. In that case, 44 vessels entered the Port of New Orleans within the prior year, some of them several times. *Id.* at 574. Even though the foreign insurer had no contact with Louisiana other than through its insureds, Judge Rubin held that the foreign insurer transacted business in the state sufficient to establish personal jurisdiction by "regularly and repeatedly maintaining insurance on a host of vessel navigating Louisiana territorial waters." *Id.* at 580.

This Court finds no distinction between the insurer of vessels and the insurer of cargo. The volume of cargo that is insured by UMS that travels through the Port of New Orleans provides sufficient contacts with Louisiana for this Court to exercise jurisdiction. This finding is buttressed by the necessity for most cargo that has been shipped on ocean-going vessels to be trans-shipped onto barges in the Port of New Orleans. This activity within the geographical confines of the State of Louisiana makes the contacts that much greater and less "fortuitous." Louisiana has a vested interest in protecting itself, its waters and its port in light of this activity. Additionally, the subject policy of UMS requiring a surveyor at the transshipment point, which habitually occurs at the Port of New Orleans, adds to its contacts with the State. While

there was some deposition testimony that that clause may not be enforced at the present time, the fact remains that the activity was contemplated at the time of the loss.

The case at bar can be distinguished from the *Young* decision. Unlike the facts in the *Young* decision, the insurance involved is cargo insurance not P&I coverage. As such, there is no indication that the insurer was apprised of the course of each voyage as UMS was apprised of the course of each shipment of covered cargo. Furthermore, the court in *Young* dismissed the analysis in *McKeithen* and *Colocotroni* with respect to a general jurisdiction analysis in light of *Helicopteros.* However, those cases remain viable in light of the Fifth Circuit's analysis in *Calvert.*

Traditional Notions of Fair Play and Substantial Justice.

"Once a plaintiff establishes minimum contacts between the defendant and the forum state, the burden of proof shifts to the defendant to show that the assertion of jurisdiction is unfair and unreasonable." *Nuovo Pigone,* 2002 WL 31318068 at *5 *citing Wien Air Alaska, Inc. v. Brandt,* 195 F.3d 208, 215(5th Cir. 1999). A compelling case must be made by the defendant. *Id.* To determine whether exercising jurisdiction over the defendants would not "offend traditional notions of fair play and substantial justice," *International Shoe,* 326 U.S. 310, that is to say whether the exercise of jurisdiction is fair and reasonable, the Court should consider:

> the burden on the defendant, the interest of the forum State, and the plaintiff's interest in obtaining relief. [The court] must also weigh in its

> determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

Asahi Metal Ins Co. v. Superior Court of California, 480 U.S. 102, 115, 107 S. Ct. 1026, 1033 (1987); *Nuovo Pigone* at *5 *citing Felch,* 92 F.3d at 324.

The Court finds that UMS has failed to demonstrate that the exercise by this Court of jurisdiction over UMS to be overly burdensome. UMS is an international company that generates substantial income from insuring cargo that is discharged and trans-loaded in Louisiana. It has benefitted substantially from those contacts. It has paid 137 claims to insureds in the United States from 1991 to 1994. Although the discovery in this case was limited, it is fair for the Court to infer that many more claims have been paid since that time. This company has in place a network of *commissar d'avaria* to handle claims in the United States; indeed, it dispatched Captain Cappato to adjust the instant claim in Louisiana. The court in its previous discussion concerning minimum contacts has already underscored Louisiana's interest in this matter. Obviously, Louisiana has an interest in ensuring the safety of its waterways. *Nuovo Pigone,* at 5. Certainly, the parties seeking redress from UMS have a vested interest in maintaining the suit here as well. The tort that gave rise to this suit occurred in Louisiana. The Court is convinced that it is reasonable and fair to require UMS to litigate this matter in this forum.

Based on the foregoing, the Court finds that it has sufficient contacts to exercise personal jurisdiction over UMS.

Personal Jurisdiction based on Federal Rule of Civil Procedure 4(k)(2) and the Fifth Amendment Due Process

Because the Court has followed the instructions of the Fifth Circuit and has determined that there are sufficient contacts to support both specific and general jurisdiction in Louisiana over UMS, a Rule 4(k)(2) analysis would be inappropriate by the very terms of the rule. However, had the Court not so found, it appears that the Fifth Circuit in *World Tanker Carriers Corp. v. MV Ya Mawlaya,* 99 F.3d 717 (5th Cir. 1996) has acknowledge that admiralty law provides a basis of the application of Rule 4(k)(2) and thus a district court could exercise jurisdiction based on a defendant's contacts with the United States as a whole where that defendant is not subject to the jurisdiction of any state. Certainly, where there is proof of hundreds of instances where cargo insured by UMS has entered U.S. waters, where UMS has a system in place to adjust claims throughout the United States, has paid for the adjusting services of those persons in the United States, has paid claims in the United States and has insured property in the United States, such indices would be persuasive in demonstrating nation-wide contacts.

Finally, as the Court has found jurisdiction under the traditional specific/general jurisdiction rubric, there is no need to address London Underwriter's argument that under the admiralty law, UMS is subject to jurisdiction using the due process clause of the Fifth Amendment.

Accordingly, in compliance with the mandate of the United States Court of Appeals for the Fifth Circuit as outline in its decision of August 14, 2000, this Court finds that it has both specific and general jurisdiction over UMS. The judgment rendered in these proceedings dated

August 3, 1998, was vacated as to London Underwriters's judgment against Britamco Underwriters, Inc. Therefore, as a result of the Court's finding of personal jurisdiction over UMS, the judgment of August 3, 1998 is hereby re-instated except as to that portion rendering judgment as to Britamco Underwriters, Inc. The Court will enter a separate judgment accordingly.

New Orleans, Louisiana, this 27th day of November, 2002.

/s/ [Illegible]
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-30026

STEVEN HENRY ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; YORKSHIRE INSURANCE COMPANY LTD; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; MARITIME INSURANCE COMPANY LTD; THE NORTHERN ASSURANCE COMPANY LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE GROUP PLC; DAI TOKYO INSURANCE CO UK LTD

Plaintiffs-Appellees-Cross-Appellants

v.

UNIONE MEDITERRANEA DI SICURTA, ET AL

Defendants

AK STEEL CORP, formerly known as Armco Steel Company LP

v.

Defendant-Appellant

UMS GENERALI MARINE SPA, formerly known as Unione Mediterranea di Sicurta

Defendant-Appellant-Appellee-
Cross Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

(Filed Jun. 8, 2004)

ON PETITION FOR REHEARING

Before DAVIS, WIENER and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

REHG-2

APPENDIX D

FED. R. CIV. P. 4(k)(2)

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

ADVISORY COMMITTEE NOTES

Paragraph (2) is new. It authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state. This addition is a companion to the amendments made in revised subdivisions (e) and (f).

This paragraph corrects a gap in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in

Omni Capital Int'l. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 111 (1987).

There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision. The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. Cf. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir.1977). There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See DeJames v. Magnificent Carriers, 654 F.2d 280, 286 n. 3 (3rd Cir.), cert. denied, 454 U.S. 1085 (1981). Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-294 (1980); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982), Burger King Corp v. Rudzewicz, 471 US 462, 476-78 (1985), Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-13 (1987). See generally R. Lusardi, Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign, 3 Vill.L.Rev. 1 (1988).

This provision does not affect the operation of federal venue legislation. See generally 28 U.S.C. § 1391. Nor does it affect the operation of federal law providing for the

change of venue. 28 U.S.C. §§ 1404, 1406. The availability of transfer for fairness and convenience under § 1404 should preclude most conflicts between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice."

The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity, or alienage subject matter jurisdiction as to such claims. If, however, personal jurisdiction is established under this paragraph with respect to a federal claim, then 28 U.S.C. § 1367 (a) provides supplemental jurisdiction over related claims against the defendant, subject to the court's discretion to decline exercise of that jurisdiction under 28 U.S.C. § 1367(c).

(2)

Supreme Court, U.S.
FILED
OCT 8 - 2004
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No. 04-316

In the Supreme Court of the United States

UNIONE MEDITERRANEA DI SICURTA, et al.,
Petitioners,

v.

STEVEN HENRY ARTHUR ADAMS, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

J. DANIEL PICOU
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QUESTIONS PRESENTED

1). Did the United States Court of Appeals for the Fifth Circuit properly apply a nationwide contact analysis pursuant to Federal Rule of Civil Procedure 4(k)(2) in order to affirm the trial court's finding of *in personam* jurisdiction over a foreign marine insurer?

2). Does *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) require a Fourteenth Amendment minimum contact analysis with the forum state when a federal district court is exercising admiralty jurisdiction over a foreign marine insurer who has been served with process pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 the Respondents to this proceeding are as follows:

1. A.K. Steel Corporation (f/k/a Armco Steel Company, L.P.)

2. Certain Underwriters at Lloyd's;

3. Certain Insurance Companies, as follows:

    a. Indemnity Marine Assurance Company, Ltd.;

    b. The Yorkshire Insurance Company, Ltd.;

    c. Commercial Union Assurance Company, Plc;

    d. Phoenix Assurance, Plc;

    e. Cornhill Insurance Plc;

    f. Norwich Union Fire Insurance Society, Ltd.;

    g. Maritime Insurance Company, Ltd.;

    h. Northern Assurance Company, Ltd.;

    i. Skandia U.K. Insurance, Plc;

    J. Ocean Marine Insurance Company, Ltd.;

k. Folksam International Insurance Company (U.K.) Ltd.;

l. Scottish Lion Insurance Company, Ltd.;

m. Wurtemmbergische Feuerversicherung A.G.;

n. Sphere Drake Insurance, Plc;

o. Dai-Tokyo Insurance Company (U.K.), Ltd.

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STATEMENT OF THE CASE

The statement of the case framed by the applicant is seriously flawed. UMS erroneously contends that the United States Court of Appeals for the Fifth Circuit resorted to a jurisdictional analysis of the contacts of UMS with the United States as a whole because it was unable to affirm the District Court's exercise of personal jurisdiction over UMS under Louisiana's Long-Arm Statute. Writ App. pp. 2, 3. However, the Fifth Circuit actually held that the exercise of personal jurisdiction is "clearer and more straightforward under Rule 4(k)(2) than under Louisiana law."

Indeed, the Fifth Circuit did not even address the trial court's factual finding that it had jurisdiction over UMS based upon its contacts with the State of Louisiana. The Fifth Circuit simply and properly affirmed the District Court's jurisdictional ruling on the alternate basis that jurisdiction over UMS could be exercised pursuant to Federal Rule of Civil Procedure 4(k)(2). *Ibid.*

REASONS FOR DENYING THE PETITION

UMS HAS NOT IDENTIFIED ANY BASIS FOR THE EXERCISE OF DISCRETIONARY REVIEW BY THIS COURT

Careful scrutiny of the reasons advanced by UMS in support of its application demonstrates that there is no meaningful basis for this Court to exercise its discretionary jurisdiction over this matter. UMS has not cited to any real conflict with any decision from this Court or with a decision from any (other) Court of Appeal.

Additionally, UMS fails to identify any compelling issue that is of significance to anyone other than a particular class of defendants in maritime civil proceedings. This class of defendants consists entirely of foreign marine insurers with nationwide contacts in the United States who seek to avoid the exercise of personal jurisdiction by a United States District Court with subject matter jurisdiction sounding in admiralty. The singular result in granting a writ of certiorari to review the Fifth Circuit's decision will necessarily impact only upon this limited class of defendants.

I. THE DECISION OF THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER DECISION FROM ANOTHER CIRCUIT COURT OF APPEALS

UMS fails to identify any conflict with any other federal Court of Appeals on the same matter of federal law. Instead, UMS only quarrels with the Fifth Circuit's interpretation of its own prior decisions defining the application of Federal Rule of Civil Procedure 4(k)(2). These issues were fully considered and passed upon by the Fifth Circuit in its ruling in this matter. Accordingly, there is no basis for this Court to review this case simply to clarify any perceived conflict in the Fifth Circuit's jurisprudential interpretations of Rule 4(k)(2).

II. THE DECISION OF THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION FROM THIS COURT

In order to obtain review by the Court, UMS relies heavily upon this Court's decision in *Omni Capital*

International v. Rudolph Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L. Ed.2d 415 (1987). In particular, UMS argues that the decision of the Fifth Circuit fails to conform with the *Omni Capital* decision which is controlling as to the jurisdiction over a foreign defendant who is not subject to Rule 4(k)(2). However, UMS fails to recognize a critical distinction between this case and *Omni Capital*. The holding in *Omni Capital* was grounded upon the fact that service of process upon the defendant was made in accordance with the Louisiana Long-Arm Statute. *Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97, 108, 108 S.Ct. 404, 411 (1987). Since certain defendants in *Omni Capital* were not amenable to service of process under the Louisiana Long-Arm Statute, this Court held that the District Court could not exercise personal jurisdiction over those specific defendants.

In arguing for a jurisdictional analysis based solely upon the contacts of UMS with the forum state, UMS fails to recognize that service of process was not made upon it pursuant to the Louisiana Long-Arm Statute. Instead, service of process was made in accordance with the procedure set forth in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Accordingly, *Omni Capital* is inapplicable to this matter because service of process was not effected under state law. As a consequence, the Fifth Circuit was not prohibited by *Omni Capital* from permitting the exercise of personal jurisdiction over UMS in accordance with the totality of its contacts with the United States.

UMS further argues that the Fifth Circuit's decision fails to properly apply Rule 4(k)(2) in light of this Court's decision in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). UMS

essentially asserts that *Wilburn Boat* requires that all marine insurance issues are to be resolved by state law and that this automatically precludes application of Federal Rule of Civil Procedure 4(k)(2) to foreign marine insurers. However, UMS glosses over the complex interplay between federal and state law in resolving marine insurance disputes in order to invite unnecessary review of the Fifth Circuit's decision.

It is axiomatic that marine insurance disputes are to be determined by federal maritime law and not by simple application of state law. *Aasma v. American Steamship Owners Mutual Protections and Indemnity Association, Inc.*, 95 F.3d 400, 403 (6th Cir. 1996). *Wilburn Boat* only allows for admiralty courts to apply state law in maritime cases in certain situations.

The decision of the Fifth Circuit is therefore entirely consistent with *Wilburn Boat*. State law does not oust or displace maritime law through *Wilburn Boat*. Instead, state law is applied as federal maritime law whether characterized as "borrowing", *Continental Casualty Company v. Anderson Excavating & Wrecking Company*, 189 F.3d 512, 519 (7th Cir. 1999), or as a result of the simple application of maritime choice of law principles. *Aasma v. American Steamship Owners Mutual Protections and Indemnity Association, Inc.*, 95 F.3d at 403; *Windsor Mount Joy Mutual Insurance Co. v. Giragosian,* 57 F.3d 50, 54 (1st Cir. 1995). When viewed in this context, the Fifth Circuit's decision is entirely harmonious with *Wilburn Boat.*

Finally, it must be noted that there is nothing in the record to support the argument of UMS that the lower courts applied state law in determining its liability as a marine

insurer. Although Louisiana law was pled in the Original Complaint, the decision of the lower courts did not turn upon the application of Louisiana law in order to impose liability upon UMS. In the absence of any application of state law, there is simply no genuine conflict between the decision of the Fifth Circuit and *Wilburn Boat.*

III. THERE IS NO NEED FOR THIS COURT TO ENUNCIATE A CLEAR INTERPRETATION OF FEDERAL RULE OF CIVIL PROCEDURE 4(k)(2)

UMS asserts that review by this Court is necessary in order to eliminate any confusion regarding the application of Federal Rule of Civil Procedure 4(k)(2). However, there is no confusion in the present state of the law regarding the interpretation of Rule 4(k)(2). The decision of the Fifth Circuit in this matter allows for a clear, concise and straightforward application of Federal Rule of Civil Procedure 4(k)(2). UMS offers no reason why such an approach should be abandoned in order to allow for the possible application of state insurance law through *Wilburn Boat.*

As a preliminary matter, it must be recognized that the arguments advanced by UMS will only promote confusion instead of clarification of Federal Rule of Civil Procedure 4(k)(2). This Court has previously conceded that its decisions concerning the permissible scope of state regulation over marine matters are inconsistent. *American Dredging Company v. Miller,* 510 U.S. 443, 452, 114 S.Ct. 981, 988-89, 127 L. Ed.2d 285 (1994). Significantly, the case usually cited as an example of this inconsistency is *Wilburn Boat. Id. Wilburn Boat* has also been the subject of considerable criticism and confusion, particularly among the lower

courts. If this Court was inclined to review this case in order to clarify and define the scope of Federal Rule of Civil Procedure 4(k)(2), arguably there could be no worse framework for this analysis than that constructed by the *Wilburn Boat* decision.

Significantly, UMS does not seek reexamination and clarification of *Wilburn Boat* by this Court. Instead, UMS seeks to incorporate this confusion into Rule 4 (k)(2) solely in order to thwart the exercise of personal jurisdiction over a foreign marine insurer. This effort is entirely unwarranted as the Court of Appeals' decision allows for a more precise application of Rule 4(k)(2) to all maritime defendants. Therefore, UMS simply fails to identify any discernible benefit that would result from review of this case by this Court.

CONCLUSION

In the absence of any real conflict between the decision of the United States Court of Appeals for the Fifth Circuit and any decision from this Court or from any other Circuit Court of Appeals, consideration of this matter by the Court is wholly unnecessary. UMS only seeks to foster unnecessary confusion in order to create a foreign marine insurance exception to Federal Rule of Civil Procedure 4(k)(2) based solely upon the *Wilburn Boat* decision. Such an exception is particularly inappropriate and would only benefit foreign marine insurers seeking to evade the jurisdiction of federal courts exercising their constitutional grant of admiralty jurisdiction. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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